IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 12, 2002 Session

RUTH ANN MITCHELL ET AL. v. BRANDYN D. JOHNSON

Appeal from the Circuit Court for Washington County
No. 7334 G. Richard Johnson, Chancellor

No. E2001-01798-COA-R3-CV Filed March 27, 2002

This case arises out of a collision on a public road between an automobile driven by the defendant, Brandyn D. Johnson, and a go-cart operated by Clayton Mitchell ("the minor") – the seven-year old child of the plaintiffs Ruth Ann Mitchell and Steve Harold Mitchell. The Mitchells sued the defendant, asserting a personal injury claim on behalf of the minor and individual claims for their alleged losses arising out of the parent-child relationship. The jury found the minor 80% at fault and, consequently, returned a verdict in favor of the defendant. The Mitchells appeal, arguing (1) the trial court erred in failing to charge the jury that the minor was entitled to make a right-hand turn once he determined that his lane of traffic was clear; (2) the trial court erred in failing to charge the jury that the minor was entitled to a presumption that he was incapable of negligence due to his age, or alternatively, that his age and capacity should be taken into consideration when evaluating the parties' comparative fault; and (3) the verdict "is not supported by the greater weight of the evidence." We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS and D. MICHAEL SWINEY, JJ., joined.

Thomas C. Jessee, Johnson City, Tennessee, and Thomas Dossett, Kingsport, Tennessee, for the appellants, Ruth Ann Mitchell and Steve Harold Mitchell.

J. Eddie Lauderback and Bradley E. Griffith, Johnson City, Tennessee, for the appellee, Brandyn D. Johnson.

OPINION

I.

This two-vehicle accident occurred on Lakeview Drive, a two-lane highway running generally north and south in Washington County. On the day of the accident, the minor was visiting his grandparents, whose house fronts on Lakeview Drive. He was driving a go-cart[1] in the field behind their house when his grandmother called to him and told him to return to the house. To accomplish this, the minor had to proceed east on a gravel walkway that was parallel to and at the edge of his grandparents' front yard; the walkway was partially separated from the yard by a fence. At the end of the walkway, the minor had to make a right turn onto Lakeview Drive, and then make another right turn almost immediately into his grandparents' yard. The described movement would approximate a U-turn movement as the minor left the gravel walkway, turned right, or south, on Lakeview Drive, and then turned right again into the yard.

The minor testified at trial that when he reached the end of the walkway, he recalled stopping at the street. Seeing nothing coming, he started to make his right-hand turn onto Lakeview Drive. The next thing he remembered was waking up in the ambulance. The defendant testified that she had pulled out of a driveway just south of the grandparents' house. As she was proceeding north on Lakeview Drive, the minor suddenly pulled out from the walkway to the defendant's left and into the path of her vehicle. The defendant stated that she applied the brakes and veered to the right, but that she could not avoid colliding with the go-cart.

The parents of the minor sued the defendant under a general negligence theory. The case proceeded to trial. The jury returned a verdict in favor of the defendant, finding that the minor was 80 % at fault. Thereafter, the minor's parents filed a motion for a new trial. The trial court approved the jury's verdict and denied the parents' motion. This appeal followed.

II.

A.

The plaintiffs' first issue raises the question of whether the trial court erred in failing to give a requested charge to the jury. The charge is as follows:

> I charged you that the statute of this state requires a driver entering a roadway from a private driveway to yield the right of way to traffic on the roadway. If such a driver is turning into a lane that is clear of on coming traffic in that lane the driver has the right to proceed into that lane.

---

[1]The go-cart in this case was built by the minor's grandfather, Harold Mitchell. Mr. Mitchell testified that the go-cart had 4-inch wheels and was about 2 inches off the ground. The minor testified that the go-cart had a left-foot brake and a right-foot gas pedal. The minor also testified that the go-cart did not have an antenna or flag attached to it. The plaintiffs' expert established the maximum speed of the go-cart as around 6.5 miles per hour.

For the reasons that follow, we find no error in the trial court's refusal to read the plaintiffs' requested instruction to the jury.

B.

At the trial court level, that court is the "final arbiter[ ] of the legal principles properly applicable to a particular case." ***Betty v. Metro. Gov't.***, 835 S.W.2d 1, 10 (Tenn. Ct. App. 1992); ***Stroud v. State***, 38 Tenn. App. 654, 669, 279 S.W.2d 82, 89 (1955). In ***Ladd v. Honda Motor Co., LTD.***, 939 S.W.2d 83 (Tenn. Ct. App. 1996), we set forth criteria to be used by trial courts in determining whether requested instructions should be given:

> [T]rial courts should give a requested instruction (1) if it is supported by the evidence, (2) if it embodies the party's theory of the case, (3) if it is a correct statement of the law, and (4) if its substance has not already been included in other portions of the charge. It should deny requested instructions that are erroneous or incomplete.

Id. at 102-103 (citations omitted). Even if a trial court fails to give a properly-phrased requested instruction, we will not reverse unless the error is prejudicial and it "more probably than not" affected the judgment. T.R.A.P. 36(b). *See also* ***DeRossett v. Malone***, 34 Tenn. App. 451, 479, 239 S.W.2d 366, 378 (1950).

C.

The trial court read to the jury the provisions of T.C.A. § 55-8-131.[2] When the trial court asked counsel, pursuant to Tenn. R. Civ. P. 51.01, if they had any "further instructions or objections," the plaintiffs' counsel submitted the special request as previously quoted in this opinion.

T.C.A. § 55-8-131 provides that a driver of a vehicle who is about to enter a highway from a private driveway "shall yield the right-of-way to all vehicles approaching on the highway." The plaintiffs argue that the minor was entitled to a further instruction stating that he had the right to make his right-hand turn onto the highway once he determined that *his* lane of traffic was clear. However, plaintiffs' proffered instruction amounts to an incorrect statement of the law. Under T.C.A. § 55-8-131, a driver coming from a private area must yield to *all* vehicles on the highway, not just vehicles proceeding in the intended direction of the entering driver. The requested instruction is contrary to the language of T.C.A. § 55-8-131. That provision is applicable to a driver moving from a private area to a public road. Since the requested instruction is inconsistent with the

[2] T.C.A. § 55-8-131 provides as follows:

> The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on the highway.

applicable statute, it is an incorrect statement of the law and the trial court was correct in refusing to give it.

D.

The plaintiffs next contend the trial court committed prejudicial and reversible error when it refused to instruct the jury that the plaintiffs were entitled to a rebuttable presumption that the minor was incapable of negligence and that said negligence must be judged according to the minor's age, intelligence, experience, etc., as set forth in ***Bailey v. Williams***, 48 Tenn. App. 320, 346 S.W.2d 285 (1960).

While the rule espoused in ***Bailey*** is applicable to general negligence cases involving minors, a minor driving a motor vehicle on a street or highway of this state is held to the same standard of care applicable to adults. ***Powell v. Hartford Accident & Indem. Co.***, 217 Tenn. 503, 513, 398 S.W.2d 727, 733 (1966); *see also* ***Black v. Quinn***, 646 S.W.2d 437 (Tenn. Ct. App. 1982); ***Mize v. Skeen***, 63 Tenn. App. 37, 468 S.W.2d 733 (1971). In reaching this conclusion, the Court in ***Powell***, quoting from a Delaware opinion, stated the following:

> We consider it to be a matter of paramount public policy, in fact a rule of necessity, that society in general be assured that all drivers of motor vehicles upon our highways be charged with equal responsibility in the operation of motor vehicles regardless of age, or any other physical or mental disparity which may exist.

Powell, 217 Tenn. at 508, 398 S.W.2d at 730, quoting ***Wagner v. Shanks***, 56 Del. 555, 570, 194 A.2d 701, 708 (1963).

It is the plaintiffs' contention that ***McIntyre v. Balentine***, 833 S.W.2d 52 (Tenn. 1992) impliedly overruled the aforesaid cases and that the jury should have been permitted to consider the ***Bailey*** factors in its analysis of comparative fault.

The ***McIntrye*** case abolished the law of contributory negligence in this state and replaced it with modified comparative fault. ***McIntyre***, 833 S.W.2d at 57. In so doing, the Supreme Court neither directly nor impliedly overruled the law with respect to minors driving motor vehicles, as promulgated by ***Powell***. Indeed, just two years after rendering its decision in ***McIntyre***, the Court relied upon the holding in ***Powell*** when it determined that a minor injured in a motor vehicle accident is held to the same standard as an adult:

> Although the law is clear that a minor's conduct is generally not to be judged by an adult standard of care, the law is equally clear that where the minor is engaged in a dangerous activity normally undertaken only by adults, such as driving a car, no special allowance

> is made for the minor's limited experience or age and, therefore, the minor is held to an adult standard of care.

Cook v. Spinnaker's of Rivergate, Inc., 878 S.W.2d 934, 937 (Tenn. 1994), citing ***Powell***, 398 S.W.2d at 730; ***Black***, 646 S.W.2d at 437; ***Mize***, 63 Tenn. App. at 37, 468 S.W.2d at 733.

While the ***Cook*** case involved an automobile instead of a go-cart, it is clear that both vehicles fall within the statutory definition of a "motor vehicle," *i.e.*, "every vehicle which is self-propelled excluding motorized bicycles and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails." T.C.A. § 55-8-101(30) (Supp. 2001). This Court has stated previously that a go-cart "is a small gasoline propelled riding device." ***Swift v. Wimberly***, 51 Tenn. App. 532, 534, 370 S.W.2d 500, 501 (1963). Therefore, a go-cart is properly viewed as a "motor vehicle," and a minor driving a go-cart is held to an adult standard of care. We find and hold that the trial court was correct is refusing to instruct the jury as to a rebuttable presumption that the minor was incapable of negligence, as such an instruction amounts to an incorrect statement of the law.

III.

In their third and final issue, the plaintiffs contend that "[t]he jury's verdict is not supported by the greater weight of the evidence."

The plaintiffs' issue – with its reference to the "greater weight of the evidence" – implicitly requests that we weigh the evidence. This we cannot do. "We do not reweigh the evidence." ***Dickey v. McCord***, 63 S.W.3d 714 (Tenn. Ct. App. 2001). We are limited to determining whether there is any material evidence to support the jury's verdict. ***Id***. In the instant case, there is ample material evidence to support the jury's allocation of fault. The jury chose to believe that evidence. This was their prerogative .

IV.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants. This case is remanded for collection of costs assessed below, pursuant to applicable law.

_____

CHARLES D. SUSANO, JR., JUDGE